United Parcel Service, Inc. *and* Teamsters Local Union 413, affiliated with the International Brotherhood of Teamsters, AFL–CIO.[1] Case 9–CA–27597

May 28, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On March 18, 1992, Administrative Law Judge Donald R. Holley issued the attached decision. The Respondent, the General Counsel, the Charging Party, and the Intervenor filed exceptions and supporting briefs. The Respondent, the Charging Party, and the Intervenor filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions, as modified below, and to adopt the recommended Order.

The judge found that the Respondent did not unlawfully discharge employee Jeffrey Pierce, because his conduct lost any protection it might otherwise be entitled to under the Act. We agree but only for the reasons set forth below.

On November 21, 1989,[2] Pierce, a driver with the Respondent, was involved in an altercation with John Napoli concerning Pierce's parking his truck in front of Napoli's restaurant while making deliveries at a nearby apartment complex. Another confrontation occurred between Pierce and Napoli the next day. Napoli contacted the Respondent, which resulted in Pierce's receiving a warning letter on December 4 stating that he had been rude and discourteous to Napoli. Although such warnings are not grievable under the parties' collective-bargaining agreement, Pierce discussed the matter with his union steward. The steward indicated to Pierce that the Respondent's center manager, Bill Henry, who talked to Napoli on the phone regarding the incident, had solicited Napoli's complaint.

Pierce decided to investigate the matter further. He then talked to Union Secretary-Treasurer Charles Teas and expressed a desire to confront Napoli. At Pierce's request, a union delegation comprised of Pierce, Teas, Union Vice President Vernon Bell, and Union Steward George Welling visited Napoli at another of his restaurants. Teas, Welling, and Pierce entered the store. Pierce told Napoli he was there as a private citizen, and asked Napoli if he would speak to Pierce. Napoli refused. Teas then displayed a special deputy badge, whereupon Napoli agreed to talk with ''the officer,'' but said that Pierce and Welling were to go outside.[3] Teas questioned Napoli as to whether Napoli had threatened Pierce and, if so, why. According to Teas' testimony, Napoli admitted to Teas that he had threatened Pierce. After a brief discussion with Napoli, Teas left the store and Pierce and Welling returned.

Napoli questioned Welling concerning his affiliations with the Union and the Respondent. Then Pierce told Napoli he was considering pursuing legal action against Napoli. Napoli at some point told Pierce that he had not wanted to lodge a formal complaint against Pierce, but that Henry attempted to solicit him to do so. Pierce said that if Napoli would put this in a sworn statement Pierce would not sue him. Napoli agreed to prepare a statement to that effect but never did so.

The next workday[4] Napoli telephoned Henry to relate what had occurred. Subsequently, Napoli provided the Respondent with a written statement concerning the December 9 visit, stating, in pertinent part, that one of the persons was ''allege[dly] . . . a plain clothes police officer'' who ''flashed his badge and wanted to ask questions.'' Napoli went on to state that he asked the others to leave whereupon the officer asked several questions.

It is clearly established under Board law that conduct can be so egregious or offensive as to be beyond the Act's protection. See, e.g., *Transpac Fiber Optics*, 305 NLRB 974 (1991); *Calliope Designs*, 303 NLRB 65 (1991); *Paper Board Cores*, 292 NLRB 995 (1989). In this regard, the Board has held that the manner in which an employee exercises a statutory right can be so extreme as to lose the Act's protection. *Carolina Freight Carriers*, 295 NLRB 1080 (1989); *Washington Adventist Hospital*, 291 NLRB 95 (1988); *W. G. Diehl Distributing Co.*, 283 NLRB 524 (1987). Assuming, as the dissent finds, that Pierce was engaged in protected activity when he visited Napoli to investigate his complaint, we find that the manner in which he conducted himself stripped his action of the protection of the Act.

Pierce requested that Teas accompany him to question Napoli. During the December 9 confrontation, when Napoli initially refused to speak with Pierce, Teas showed Napoli his badge. At that point Napoli agreed to speak only with Teas, clearly because he was under the misapprehension that Teas was a law enforcement official. Thus, it is clear that Teas' impersonation of a law enforcement ''officer'' gave rise to false, intimidating, and coercive circumstances that

[1] The name of the Charging Party has been changed to reflect the new official name of the International Union.

[2] All dates are in 1989 unless otherwise indicated.

[3] The judge found that the badge held by Teas was what might be called an ''honorary badge'' and that Teas in fact held no paid position with the County Sheriff's Department. There was no exception to this finding.

[4] The judge inadvertently stated that the next workday was Monday, December 12, rather than December 11.

subsequently permitted Pierce to pursue his own interrogation of Napoli about Napoli's complaints concerning him. For absent Teas' flashing his badge and causing Napoli mistakenly to believe he was a ''law officer,'' Napoli would surely have maintained his refusal to even talk with Pierce or Teas.

Contrary to our dissenting colleague, irrespective of whether Pierce had prior knowledge of Teas' planned impersonation, it is plain that Pierce willingly acquiesced in Teas' conduct and took advantage of it by using Teas' interrogation of Napoli as a backdrop for his own threat of further legal action against Napoli, unless Napoli furnished an affidavit implicating management in the solicitation of Napoli's complaint against Pierce. In this regard it is significant that, on December 12, when Manager Henry asked Pierce to identify the police officer who accompanied him on December 9, Pierce did not suggest that he had been taken by surprise when Teas flashed the ''deputy'' badge. Instead, Pierce refused to identify the individual, stating ''I will not reveal that information.'' Then, when Henry chastised Pierce for harassing Napoli and urged him to refrain from similar future incidents, Pierce refused and insisted, ''That's my personal business.''

We find that the false, intimidating, and coercive circumstances under which Pierce conducted his investigation at Napoli's place of business on December 9 were sufficiently egregious to cause Pierce to lose any protection he would otherwise be entitled to under the Act for his investigative activity. We accordingly conclude that the Respondent's discharge of Pierce for engaging in that conduct, and also for threatening to continue his individual pursuit of Napoli, did not violate Section 8(a)(3) and (1).[5]

[5] The judge relied on *Lear-Siegler Management Service*, 306 NLRB 393 (1992), to find Pierce's conduct during the incident was unprotected. We find that case to be factually distinguishable and therefore do not rely on it for our holding. In *Lear-Siegler*, the Board tolled the backpay of an unlawfully discharged employee after he threatened a witness in a Board proceeding with respect to the discharge that he would report the witness to law enforcement authorities for a parole violation in order to induce the witness to testify in a certain way. The Board further denied the employee reinstatement based on the discriminatee's additional threat of ''specific consequences to [the witness'] well-being'' by the discriminatee who had a ''reputation in the workplace as a violent and disruptive person.'' *Lear-Siegler* at 394.

Lear-Siegler thus involved the strictly remedial issue of whether the particular postdischarge misconduct affected the awarding of the Board's traditional remedies to an employee found to have been unlawfully discharged. The case at issue, in contrast, involves the legality of the discharge itself and, specifically, whether an employee's conduct was sufficiently egregious as to lose the protection of the Act. Further, the threat in *Lear-Siegler* found by the Board to warrant the tolling of backpay involved ''the integrity of the Board's judicial process.'' Id. On that basis, the Board fashioned a remedy that struck a balance between the ''competing and equally important interests of protecting the Board's judicial processes and remedying unfair labor practices.'' Id. The threat found to warrant the denial of reinstatement essentially involved a threat of physical or bodily harm. No such threats are present here.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, United Parcel Service, Inc., Obetz, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

MEMBER DEVANEY, dissenting in part.

Contrary to my colleagues, I would find that the Respondent violated the Act when it discharged Pierce for his investigation of the circumstances surrounding the issuance of his warning letter.

As an initial matter, I find that Pierce's investigation constitutes protected concerted and union activity. It is firmly established that an employee is engaged in concerted activity under the Act when asserting a right grounded in a collective-bargaining agreement. See, e.g., *Carolina Freight Carriers*, 295 NLRB 1080 (1989); *Howard Electric*, 285 NLRB 911 (1987), enfd. 873 F.2d 1287 (9th Cir. 1989). These cases rely on the Supreme Court's decision in *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984), in which the Court endorsed the Board's longstanding *Interboro* doctrine, 157 NLRB 1295 (1966), enfd. 388 F.2d 495 (2d Cir. 1967), to the same effect.

Thus, even if Pierce had been acting alone or simply as an individual, as the Respondent asserts, he would clearly be engaged in concerted activity because he was investigating his discipline in order to determine if it was grievable on the basis of discriminatory motivation. In fact, although the judge noted that under the parties' agreement warning letters are not subject to the grievance procedure, Pierce, as a result of his investigation, filed a grievance over the letter under the parties' contract on December 11 alleging that the discipline was ''unfair, without just cause, and discriminatory.'' Whether this grievance was in actuality subject to the parties' grievance procedure is irrelevant because Pierce was acting under an honest and reasonable belief that the Employer was acting contrary to his contractual rights. *Transpac Fiber Optics*, 305 NLRB 974 (1991).

Further, the Respondent's argument that Pierce was acting as an individual based on his statement to Napoli that he was there as a private citizen is taken out of context and plainly misconstrues Pierce's intent. The record clearly establishes that Pierce was not in any manner disassociating himself from the Union or his fellow employees. Rather, being sensitive to a possible claim that he was on company time representing the Respondent, he sought to assure Napoli that this was not the case.

The record demonstrates that Pierce was not acting alone. He was accompanied by several union officials including Welling, a fellow employee and union steward. Although Welling testified that he was unaware of the work-related nature of Pierce's dispute with Napoli at the outset, Welling participated in the investigation during which the nature of the conflict became apparent. At some point, Welling discussed with Napoli the fact that he was an employee of the Respondent as well as a union steward. Under these circumstances, I conclude that Pierce was engaged in concerted rather than individual activity when he confronted Napoli to investigate the circumstances surrounding the warning letter. See also *Dougherty Lumber Co*., 299 NLRB 259 fn. 1 (1990), enfd. mem. 941 F.2d 1209 (6th Cir. 1991).

I strongly disagree with my colleague's conclusion that Pierce's conduct removed itself from the protection of the Act.[1] An employee's attempt to assert and protect rights arising from a collective-bargaining agreement is concerted activity for which the employee may not be discharged unless his conduct is so egregious, flagrant, or offensive as to lose the Act's protection. See, e.g., *Paper Board Cores*, 292 NLRB 995 (1989); *Ecker Mfg. Corp*., 286 NLRB 470 (1987); *W. G. Diehl Distributing Co*., 283 NLRB 524 (1987). Numerous Board cases, such as those relied on by the majority, illustrate that a finding that an employee's concerted activity forfeits this statutory protection is not to be made lightly. Thus, the Board has established a high standard to justify removing conduct from the Act's protection. Contrary to the majority's assessment, the facts here simply do not warrant the draconian conclusion that Pierce's conduct was so egregious or offensive as to lose the protection of the Act.

Pierce did nothing more than ask Teas, among others, to accompany him to confront Napoli in order to ascertain if the complaint against him had been solicited. There is no evidence indicating that Pierce asked Teas to represent himself as a law enforcement official. To the contrary, it is evident that Pierce asked Teas to accompany him as a friend and union official. The facts surrounding Teas' displaying his badge and identifying himself in some way as a special deputy are sketchy at best. However, it is beyond dispute that Pierce did not participate in the misrepresentation. My colleagues in effect find Pierce guilty of the sin of omission, i.e., his failure to affirmatively step forward and disassociate himself from Teas' conduct. I reject resting a determination that an employee has forfeited his statutory protection on such flimsy reasoning. The majority maintains, with the benefit of hindsight and distance, that Pierce should have acted in another way and come forward to correct any misimpression Napoli might have had concerning Teas' status. Even were I to agree that the manner in which Pierce conducted himself was not the most desirable under the circumstances, such a judgment falls far short of justifying a finding that Pierce himself engaged in false, intimidating, or coercive conduct. In sum, I conclude that Pierce engaged in no conduct meeting the requisite standard of being so egregious or offensive as to warrant depriving him of the Act's protection, and that my colleagues' application of that standard to the facts here is wholly unpersuasive. Accordingly, contrary to my colleagues, I would find that the Respondent violated the Act by discharging Pierce.

[1] I agree with the majority that *Lear-Siegler*, 306 NLRB 394 (1992), is factually distinguishable from the present case and, contrary to the judge, does not support the finding of a violation here. I further note that I did not participate on and I express no opinion as to the Board's decision in that case.

Eric Taylor, Esq., for the General Counsel.
Frank G. Wobst and *John M. Stephens, Esqs. (Porter, Wright, Morris & Arthur)*, of Columbus, Ohio, for the Respondent.
Robert Handleman, Esq., of Columbus, Ohio, for Charging Party Jeffrey Pierce.

DECISION

STATEMENT OF THE CASE

DONALD R. HOLLEY, Administrative Law Judge. Upon an original charge filed on June 11, 1990, the Regional Director for Region 9 of the National Labor Relations Board issued a complaint on August 1 which alleged, in substance, that United Parcel Service, Inc. (Respondent) violated Section 8(a)(5) of the National Labor Relations Act by refusing since January 11, 1990, to furnish the Union with information requested on December 28, 1989.[1] Respondent filed a timely answer denying it had engaged in the unfair labor practice alleged in the complaint. Thereafter, on September 10, 1990, the Regional Director issued an amended complaint which realleged the matter contained in the August 1 complaint and additionally alleged that Respondent discharged employee Jeffrey Pierce on December 13, 1989, in violation of Section 8(a)(3) and (1) of the Act. Respondent filed timely answer denying that it had engaged in the unfair labor practices alleged. In both of its answers to complaint, Respondent contended the subject matter of the complaints had been arbitrated and that the Board should defer to the arbitration award.

This case was heard in Columbus, Ohio, on April 8 and 9, 1991. All parties appeared and were afforded full opportunity to participate. On the entire record, from my careful consideration of the briefs filed by the parties, and from my observation of the demeanor of the witnesses who appeared to give testimony, I make the following

[1] All dates herein are 1989 unless otherwise indicated.

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation with an office and place of business in Columbus, Ohio, is engaged in the intrastate and interstate transportation of freight. During the 12-month period preceding issuance of the August 1, 1990 complaint, it, in the course and conduct of its operations, derived gross revenues in excess of $50,000 for the transportation of freight from the State of Ohio directly to points located outside the State of Ohio. It is admitted, and I find, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. STATUS OF LABOR ORGANIZATION

It is admitted, and I find, that Teamsters Local Union 413, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Facts*

Respondent is engaged, on a national and international basis, in the delivery of mail and other packages, goods, and materials. Its Renoldsburg center which is located in Obetz, Ohio, a suburb of Columbus, Ohio, is the only facility involved in the instant case.

At times material, Respondent personnel assigned to the Renoldsburg center were supervised by Bill Henry, the package center manager, Nancy Thompson and Butch Martin, supervisors, and George Taylor, division manager.[2] Additionally, the record reveals that Larry Henry is Respondent's district labor relations manager, with responsibility for facilities in the Columbus, Ohio area.

The employees at the Renoldsburg center are represented by Teamsters Local 413. During the period under discussion, the Union and Respondent were signatory to a collective-bargaining agreement which contains a grievance procedure and provides for binding arbitration by a joint panel composed of an equal number of employer and union representatives (Jt. Exh. 4).

The alleged discriminatee, Jeffrey Pierce, was employed by Respondent from September 28, 1977, to December 13, 1989. From June 1985 until his termination, Pierce was a package car (delivery van) driver. During the latter half of 1989, Pierce's immediate supervisor was Thompson. Bill Henry was Thompson's immediate superior.

On November 21, 1989, about 10:30 a.m., Pierce parked his truck at the north end of a strip shopping center on Hamilton Road in Columbus, Ohio, to make a delivery to an adjacent apartment complex.[3] While the truck was parked in front of a pizza shop called Napoli's Villa, the shop was not to open until 11 a.m., and other parking immediately in front of the shop was not blocked. As Pierce returned to his truck after spending 5 minutes or so making a delivery at the apartment complex, John Napoli, the owner of the pizza business, complained to Pierce that he was blocking his customer parking spots. Pierce testified that Napoli, using obscene language, threatened him by telling him if he parked in that place again he would break his nose and bust the windshield of his vehicle. Pierce explained that he had been parking in the spot for over a year, and he was never aware that there was a problem. After indicating to Napoli that he had been told to park in that spot in the past, he told Napoli he was not free to make decisions ''deterring from what I've been instructed to do,'' and he provided Napoli with Respondent's telephone number indicating he could call the Company and discuss the matter. Pierce claims Napoli ran after his truck yelling obscenities as he left the immediate area.[4]

Napoli telephoned Respondent after Pierce left the area on November 21 and lodged a complaint against Pierce for parking where Napoli claimed customers would have trouble getting around him (see G.C. Exh. 7).

The following day, November 22, Pierce once again parked in the same general area of the Hamilton Road shopping center. He indicated, however, that he parked nearer the road and further away from Napoli's Villa. Once again, Napoli accosted the driver, threatened to break his nose and the windshield of his truck, and informed Pierce he intended to call Respondent and get him fired. Pierce asked Napoli if he owned the facility, and, when Napoli stated he leased, the employee told him he had been led to believe the lot was a common area and he had been told to park there in the past by management. As Pierce drove away, Napoli chased alongside the vehicle and invited Pierce to get out of the truck and fight.[5]

After Pierce moved his truck away from the pizza shop area, Napoli again called Respondent and conversed with Center Manager Henry. Napoli testified that after voicing his complaint about the place where Pierce had parked, he told Henry he was upset with Pierce because of his attitude. He indicated Henry apologized for any inconvenience it had caused him and told him he would take care of the problem.

Pierce also telephoned the facility immediately after the November 22 incident. He first reported to Supervisor Martin that he had parked where he always parked at the Hamilton Road shopping center and a customer had threatened him with bodily harm and damage to his vehicle. Martin passed the phone to Nancy Thompson, and she turned the matter over to Henry. Pierce testified that when he started to tell Henry about the man who threatened him with bodily injury and damage to his vehicle, Henry asked for the man's address and phone numbers. When Pierce informed him he did not know the phone number, Henry told him he would see him when he got in.

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[2] Henry, Thompson, and Martin are admittedly 2(11) supervisors.

[3] See G.C. Exhs. 10(a)–(d).

[4] Before leaving the shopping center, Pierce obtained a statement from one Clyde McCoy, the owner of a flower shop in the center, which confirmed Pierce's claim that Napoli threatened to harm the employee and his vehicle, and indicated that Pierce conducted himself in a gentlemanly manner. See G.C. Exh. 17.

[5] Larry Barnett, an employee of Columbia Gas of Ohio, testified he witnessed an incident wherein the owner of the pizza shop on Hamilton Road accosted a UPS driver at approximately 10:30 a.m. He indicated the owner of the pizza shop was irate about the driver blocking his parking space and he indicated as much liberally with profanities, while the driver was polite and professional in explaining he was making a delivery and would only be there a few minutes.

When Pierce returned to Respondent's facility on November 22, Thompson showed him a computer form which revealed Napoli had telephoned to complain about where he had parked at the shopping center on November 21. The form indicated Henry had spoken with Napoli to apologize for Pierce ''being rude'' and ''blocking customers.'' Pierce claimed he had done nothing wrong, and Thompson responded, ''What can I tell you.''

At some time on November 22, Supervisor Thompson told Union Steward Mark Holton that he had better talk to his boy Pierce because he had a customer complaint. She said that Bill Henry had talked to the guy on the phone that day and had repeatedly asked the guy if Jeff was rude and would he file a complaint against him. She said he had asked the guy 10–15 times was the driver rude; will you sign a complaint against him.[6]

On November 27, Pierce filed a ''Menacing Threats'' complaint with the Division of Police, Whitehall, Ohio, documenting the threats made against him on November 21 and 22 by Napoli (G.C. Exh. 2).

On December 4, 1989, Henry handed Pierce a copy of a letter addressed to Union Business Agent Jim Harvey. The body of the letter (G.C. Exh. 3) states:

> This letter is in regard to Jeff Pierce who has been employed in our Obetz operation since September 28, 1977.
>
> On November 21, 1989, Jeff was rude and discourteous to a customer.
>
> Should Jeff be involved in another incident of this nature, he will leave me no alternative than to take more severe disciplinary action up to and including discharge.

When Bill Henry gave Pierce the above-described warning letter, Pierce stated: ''That's interesting, Bill. That guy is going to get a lawsuit.''

After Pierce received a copy of the above-quoted warning letter, Union Steward Holton relayed to the employee his November 22 conversation with Thompson. In essence, he told him that Henry had solicited Napoli to file a rudeness complaint against him by asking 10–15 times if he had been rude and whether Napoli would sign a complaint. At that point, Pierce and Holton discussed the situation. Pierce protested his innocence and indicated he intended to pursue the matter in an attempt to get the truth out regarding the situation.

Although warning letters such as the one received on December 4 were not grievable under the terms of the bargaining agreement, Pierce discussed the Napoli situation with Union Secretary-Treasurer Charles Teas during the period December 4 to 9, 1989. Pierce evidenced a desire to confront Napoli, with an object of seeking to determine whether Center Manager Henry had, in fact, solicited Napoli to sign a rudeness complaint against him.

On December 9, 1989, a union delegation which included Teas, Union Vice President Vernon Bell, Union Steward George Welling, and Pierce sought to locate Napoli. After visiting the Hamilton shopping center location, and hearing he was at a second pizza store located in Gahanna, also a suburb of Columbus, the four went to the latter store. Teas, Welling, and Pierce entered the store at approximately 5 p.m. Pierce asked Napoli if he recognized him and Napoli indicated he did by asking if he was still employed by UPS, and did UPS know he was there. Pierce responded by saying he was there as a private citizen who felt his rights had been violated and he would like to talk to Napoli. Napoli said he did not have time to talk. At that point Teas displayed a special deputy badge, and Napoli indicated he would talk with the officer, but that Pierce and Welling were to go outside.[7] Teas testified he asked Napoli if he had threatened Pierce and, if so, why. He claims Napoli admitted telling Pierce he would break his nose and throw rocks through the windows of his truck. He said his reason was that Jeff had parked his package truck in the parking lot near his store. After a brief discussion with Napoli, Teas left the store, and Pierce and Welling entered.

When Pierce and Welling entered the store for the second time, Welling was wearing a Teamsters Local 413 jacket and a baseball cap with a large steward's badge on the front. Napoli questioned him about who he was, whether he belonged to the Union and was a steward, and whether he worked for UPS. Pierce then told Napoli he was considering taking him to court and suing him for defamation of character. Napoli told Pierce if he did sue him, he would, in turn, sue Pierce and UPS. At some point, Napoli told Pierce ''I did not even complain on you . . . all I wanted you to do was move your truck . . . your Boss, Bill Henry, tried to get me to make a formal complaint against you and I wouldn't do it!'' Pierce told Napoli that if he would put what he had just admitted to him in a notarized statement, he would not sue him. Napoli agreed he would give Pierce a statement and leave it at a third party's place of business for later pickup.[8] Napoli did not prepare the notarized statement Pierce had requested.

On Monday, December 12, Napoli telephoned Henry to tell him what had occurred on Saturday evening. Thereafter, Henry, in the presence of Union Steward Donnell Gladis, interviewed Pierce about the December 9 incident. Pierce secretly taped the meeting and the transcript was placed in the record as General Counsel's Exhibit 5. Summarized, Henry accused Pierce of harassing a customer and sought to obtain a commitment from Pierce that he would not harass or sue Napoli. Pierce indicated he felt Napoli had been untruthful and as it was damaging his reputation with his employer, he intended to sue him. Pierce admitted during the interview that Welling accompanied him on December 9, together with a police officer whom Pierce refused to identify. Larry Henry interviewed Welling on December 19, and the employee claimed he accompanied Pierce on December 9 because Pierce told him he had been threatened and he needed a witness. Welling denied that he was acting in his official capac-

[6] The record reveals Henry telephoned Napoli after Napoli reported the November 22 incident to him.

[7] The badge held by Teas was what may be called an ''honorary badge.'' He holds no paid position with the Fairfield County Sheriff's Department.

[8] Napoli's version of the incident differed markedly from that given by General Counsel witnesses. Thus, he claimed that Teas simply asked him if Henry had encouraged him to file a complaint on Pierce and Pierce told him he needed his help because UPS had fired him. He agreed he told Pierce he would furnish a notarized statement, but failed to indicate what it would contain. I do not credit his fragmentary account of the conversation during the incident.

ity as a union steward and he denied he made any threatening remarks to Napoli.

After meeting with Pierce and steward Gladis on Tuesday, Henry and one Tom Fisher obtained the following statement from Napoli:

> This statement I hereby make to Bill Henry and Tom Fisher of United Parcel Service is a true and accurate statement of the event that occurred at 5:10 at 51 South Hamilton Road, Napoli's Villa on 12–9–89. Jeff looked for me and then proceeded to my other store at 129 North Stygler Road and found me there at 5:20. Three people arrived, one being Jeff Pierce, and the other alleging to be a plain clothes police officer and the last one a union man. The officer flashed his badge and wanted to ask questions. I made Jeff and the other guy leave and proceed with the officer. He asked several questions about Bill Henry pertaining to a customer complaint. Did Bill try to persuade me to file a complaint. Did not want to know about what was really going on. Officer left and then Jeff and union guy came in and started to ask questions. I was really busy and couldn't talk but persuaded me to talk to them. Said, he wanted to sue me because this will cause a mark on his record. Ask why he was so interested in me. He wanted me to sign a notarized statement saying that I did not file a complaint against him. I said I would and he could pick it up Monday or Tuesday at Carmens Sweepers. He said if I did this he would not sue me. I said okay. I went along with him until I could talk to Bill Henry on Monday, talked to Bill to review what happened.
>
> I personally feel that I was lied to by Jeff on Saturday and feel I may be in danger at some other time in the future. I feel he tried to come in Saturday night on behalf of trying to scare me. I did not fall for it. I think he may try to hurt my business or me in the future. The police have been notified and do not want to deal with that matter any more.
>
> [Dated] 12–17–89
> /s/ John J. Napoli
>
> Also Jeff did file a complaint against me on Monday With the Whitehall Police Dept. I found out by one of the officers.

After Henry conducted the above-described investigatory interview with Pierce on December 12, Respondent decided to terminate him. Consequently, on December 13, 1989, it met with the Union to discuss its intention to discharge the employee. Attending for Respondent were George Taylor, the district supervisor, and Bill Henry, the center supervisor. In addition to Pierce, Union Representative Jim Harvey and Union Steward Mark Holton attended. Pierce was informed during the meeting that consideration of his total work record and the December 9 Napoli incident caused Respondent to decide to terminate him. Specific matters mentioned included: failure to use seat belt; violation of no-solicitation rule; problems with methods such as no times on air stickers; insubordination; and customer complaint about parking and rudeness.[9]

Pierce filed a grievance over his discharge on the following day, December 14. In the grievance Pierce contended that by discharging him on December 14, 1989, the Company violated the collective-bargaining agreement and Section 8(a)(1), (3), (4), and (5) of the Act.[10]

Pierce's termination grievance was assigned the number 4636. It was initially scheduled to be heard by the UPS-Teamsters Union Joint Grievance Committee on December 20, 1989. Prior to the hearing, the Union presented Larry Henry, the Company's spokesman, with documents which Henry contended he needed to review. The arbitration panel, which consisted of two Respondent representatives and two union representatives, put Pierce's discharge grievance on hold until the next session, which was to be held on January 15, 1990.

By letter dated December 26, 1989, Pierce requested that Larry Henry and/or Respondent furnish him with the following documents:[11]

> I am herewith requesting copies of the below listed documents. They are necessary for my January termination Panel and pending Grievances:
>
> —6/26/89 DOT Physical documents including Physicians Examination Report
> —11/27/89 Employee Injury/Illness Report for 11/2/89 OJS stress induced headache
> —Letter to UPS District Complaint against Willie Jennings for OJS Complaint
> —6/6/89 OJS SAFETY RIDE EVALUATION WITH C. OTIMAN
> —7/3/89 OJS H. McCOY
> —7/5/89 OJS H. McCOY
> —7/6/89 OJS H. McCOY
> —7/27/89 OJS R. COLLIER
> —7/29/89 OJS R. COLLIER
> —9/19/89 OJS W. JENNINGS
> —11/2/89 OJS B. HENRY
> —11/27/89 OJS R. COLLIER
> —11/28/89 OJS R. COLLIER
> —11/29/89 OJS R. COLLIER.
>
> I need copies of all evaluation writeups including the 21 methods per stop evaluations. Further, I need copies back to 3/20/89 of my delivery records, pickup logs, misload cards, and the computer operation report, for the 3/20–12/20 nine month period.

By letter dated December 28, 1989, the Union requested that Respondent furnish the following (G.C. Exh. 12):

> Local 413 is hereby requesting all pertinent information leading to the discharge of Jeffrey S. Pierce. I refer you to your letter of discharge, dated December 14, 1989, to Mr. Pierce, in which you state that his discharge is due to serious customer complaints and his overall unacceptable work record. Therefor, it will be necessary for you to provide Local 413 with all the

[9] Pierce secretly recorded the meeting. See G.C. Exh. 9.
[10] See Jt. Exh. 5.
[11] See G.C. Exh. 11.

> records, paper-work and documents that you use to substantiate these charges against Mr. Pierce.
>
> Further, please include copies of all the information and documents that Mr. Pierce requested in his letter to me dated December 26, 1989, a copy of which is enclosed.

By letter dated January 11, 1990, Respondent furnished the Union with certain information stating:

> Attached are copies of the itemized documents requested by Mr. Pierce in connection with his January termination Panel and pending grievances.
>
> We are not providing the other documents requested by Mr. Pierce at this time because we do not believe that this information is even remotely relevant to the cases to be heard.

By letter dated January 17, 1990, the Union again requested that Respondent furnish it with the information previously requested. The request differed from the earlier request in one respect. Instead of requesting the 7/29/89 OJS study by Supervisor H. McCoy, it requested the 7/27/89 OJS study by McCoy (G.C. Exh. 15).

By letter dated January 26, 1990, Respondent indicated to the Union that it had given the Union the specifically requested OJS evaluations which it had on file but was not enclosing other requested documents because ''I fail to see even a remote relevance to the case at hand.'' The letter was signed by Larry Henry (G.C. Exh. 16).

The record reveals the information not supplied included: Pierce's delivery records, pickup logs, misload cards, and computer operation reports for the period March 20 to December 20, 1989.

Larry Henry indicated during his testimony that, while driver delivery records are kept by Respondent for a year, providing them would be a time-consuming task as the driver's daily timecards would have to be inspected to identify the units delivered each day, and then the individual unit documents would have to be pulled from the files. He testified that driver pickup logs are usually discarded on the Monday following the date of pickups after they have been audited to assure that proper pickups were made. He indicated misload cards are usually kept only until mistakes are corrected. Henry indicated computer operation reports, which show driver's name, time he started to work, time he left the building, how much time for lunch, time returned to building, aggregate total of stops, miles, pieces, number of call tags, C.O.D. collections, and failures to collect, are retained for at least 9 months. With respect to the computer operation reports, Henry testified that, while one could determine a driver's performance by viewing the reports, the reports covering a 9-month period would probably consist of 1000 pages. Henry admitted he did not tell the Union Respondent did not want to supply the information it considered to irrelevant because it did not have certain records and production of those it did have would be a burdensome task.

Pierce's discharge grievance was heard by the arbitration panel on January 15, 1990. Larry Henry, Bill Henry, and Tom Buoni attended for Respondent. Jeff Pierce, represented and assisted by Charlie Teas, Mark Holton and Donnell Gladis, appeared for the grievant. The proceedings lasted several hours. Larry Henry acted as chief spokesman for Respondent. While Larry Henry indicated to the panel that Pierce's December 9 confrontation of Napoli was the incident that had triggered the termination, he indicated overall work performance matters considered included: the employee's morning loading procedures; the employee's failure to wear a seatbelt at all times when operating his vehicle; the employee's alleged violation of a company no-solicitation rule; and the employee's actions and subsequent refusal to work during a ride with Supervisor Bill Henry. The Union, through the actions of Teas, Pierce, and Holton, rebutted each of the Company's contentions. At one point during the proceedings, Teas observed the Company had failed to provide the Union with requested records of OJS rides, and he caused Pierce to relate remarks made by supervisors during specific rides by referring to notes he had made. The panel members questioned the propriety of Pierce's actions as the notes had not been shown to the Company prior to the hearing.[12] With respect to the information requested by the Union prior to the arbitration proceeding, Larry Henry indicated the Company had refused to submit certain information on the advice of legal counsel. When the chairman of the panel indicated that the Union was entitled to everything it needed to present its case, Larry Henry replied:[13]

> With all due respect Ron, I'd like to answer that for you. I think he requested 9 months of delivery records, 9 months of misload cards, 9 months of timecards. They're all enumerated there. Now I don't believe you saw me refer to to any of those in my presentation. Now, I'm a reasonable man and try to do what's reasonable and I've always complied with the Union's request to provide information that is relevant to a case.

The chairman was apparently satisfied with Henry's explanation as he stated: ''That was my main concern as chairman here.''

At the conclusion of the January 15, 1990 hearing, decision on the discharge grievance was tabled until grievances submitted by Pierce in Cases 4659 and 4660 were heard. The two remaining grievances were heard by the arbitration panel on February 12. One involved a 5-day suspension imposed on Pierce as a result of his conduct during an ''on job supervision (OJS) ride with Bill Henry on November 2, 1989.'' The second related to a request for backpay when Pierce was required to take time off work due to a driver's license revocation situation.[14] At the conclusion of the February 12 hearing, the arbitration panel issued its decision in Case 4636, the discharge grievance, stating:

> Decision in Case No. 4636 is based on the facts represented, the claim of the Union is denied. This Committee found no violation of city, state or federal law.

Subsequent to February 12, 1990, Respondent entered a unilateral settlement agreement wherein it agreed to rescind a warning letter issued to Pierce pursuant to Respondent's no-solicitation rule. The Union requested that Pierce's discharge case be reopened as Respondent had relied on the

[12] See Jt. Exh. 1, pp. 10 and 11.

[13] See Jt. Exh. 1, pp. 22, 28, and 29.

[14] The arbitration panel reduced the 5-day suspension to a 1-day suspension, and it denied the license revocation grievance.

warning letter when defending its decision to terminate Pierce. During its July 16–17, 1990 session, the arbitration panel considered the new evidence and thereafter declined to reopen the discharge case.[15]

Issues

1. Whether the Board should defer to the arbitrator's award.

2. In event deferral is inappropriate, whether Respondent terminated Pierce for engaging in union and/or protected concerted activities.

3. Whether Respondent violated Section 8(a)(5) by refusing to furnish the Union with requested information.

Analysis and Conclusions

Counsel recognize in their briefs that the Board will defer to arbitration awards when (1) the proceedings were fair and regular; (2) all parties have agreed to be bound by the award; (3) the award is not clearly repugnant to the Act. *Spielberg Mfg. Co*., 112 NLRB 1080 (1955). In *Olin Corp*., 268 NLRB 573, 574 (1984), the Board held that the arbitrator must have considered the unfair labor practice before it would defer to an arbitration award; that the arbitrator will be deemed to have adequately considered the unfair labor practice if (1) the contract issue is factually parallel to the unfair labor practice issue and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice. With regard to the ''clearly repugnant'' standard, the Board stated in *Olin* (at 574):

> [W]e would not require an arbitrator's award to be totally consistent with Board precedent. Unless the award is ''palpably wrong,''i.e., unless the arbitrator's decision is not susceptible to an interpretation consistent with the Act, we will defer.

General Counsel contends the arbitration proceedings under discussion were not fair and regular because: (1) Respondent refused to provide the Union with information relevant to Pierce's performance generally and to Respondent's characterization of Napoli as a customer; (2) Teas refused to disclose his identity as the Fairfield deputy sheriff who accompanied Pierce to Napoli's Villa on December 9, thus creating a conflict between the Union and the employee it represented; and (3) the arbitration panel accepted the statements contained in Napoli's affidavit as true.

Respondent, claiming that the party seeking to have the Board reject deferral must bear the burden of affirmatively demonstrating that the deferral standards have not been met, contends General Counsel has failed to sustain his evidentiary burden. I find, for the reasons set forth below, that deferral to the arbitration panel's decision would be inappropriate.

It is well established that Section 8(a)(5) of the Act imposes on an employer the duty to furnish a union, on request, information relevant and necessary to carry out its obligations as the employees' exclusive bargaining representative. Under the standard of relevancy as applied by the Board and the courts, it is sufficient that the union's claim for information he supported by a showing of ''probable'' or ''potential'' relevance. *NLRB v. Acme Industrial Co*., 385 U.S. 432 (1967); *International Harvester Co*., 241 NLRB 600, 603–604 (1979). With further respect to relevancy, it has been held that ''wage and related information pertaining to employees in the bargaining unit is presumptively relevant, for, as such data concerns the core of the employee-employee relationship, a union is not required to show the precise relevance of it.'' *Curtis Wright Corp. v. NLRB*, 347 F.2d 61 (3d Cir. 1965); *Stephen Oderwald, Inc*., 284 NLRB 277, 279 (1987).

As indicated, supra, Respondent informed the Union, Pierce, and the arbitration panel, which heard Pierce's discharge grievance, that Pierce was terminated because of his total work record, and because of the December 9, 1989 incident involving John Napoli. With respect to total work record, Pierce, individually and through the Union, requested that the Company supply on-the-job supervisor evaluations, *delivery records, pickup logs, misload cards, and computer operation reports for the 9-month period commencing March 20, 1989*. Respondent supplied the supervisor evaluations, but failed to supply the italicized documents. It contended such records were not relevant to the grievance.

With respect to the Napoli incident, Respondent repeatedly referred to Napoli as a customer during the arbitration proceedings. Pierce contended Napoli's Villa had never been a pickup customer, and that it was not a regular delivery customer. As he had been assigned to the route which included the Napoli's Villa during the 9-month period preceding his termination, his pickup records, and his delivery records clearly constituted relevant information as they would show whether the pickups and deliveries were made to Napoli's Villa during the period under discussion. Moreover, Pierce's misload records would reveal his degree of efficiency or lack of same during the same period. Finally, Respondent witness Larry Henry affirmatively indicated, when cross-examined, that a driver's performance could be determined by viewing the computer operation reports requested by the Union.

The transcription of Pierce's discharge hearing before the arbitration panel reveals that the chairman of the panel recognized that the Union's information request was not totally honored by Respondent. At one point, he asked why all the requested information had not been produced. Respondent's representative indicated such information was not relevant because it was not needed by the Union to rebut the specific evidence offered by the Company to support its discharge decision. The chairman indirectly indicated he accepted the company spokesman's explanation.

In sum, the record reveals the arbitration panel refrained from requiring Respondent to produce requested information which was relevant to Pierce's discharge grievance although Respondent was required by Section 8(a)(5) of the Act to produce the information. I find that by refusing to furnish the Union with requested delivery records, pickup logs, misload cards, and computer operation reports for the 9-month period commencing March 20, 1989, Respondent failed to provide the Union with relevant information which would enable it to represent Pierce fully during the arbitration proceeding. In the circumstances described, I find that deferral to the award

[15] See Jt. Exh. 9.

of the arbitration panel would be inappropriate. *NLRB v. Designcraft Jewel Industries*, 675 F.2d 493 (2d Cir. 1982).[16]

The Union and/or Concerted Activity Issues

General Counsel Contends that Pierce was engaged in both union activity and in protected concerted activity when he visited Napoli's pizza store on December 9, 1989. Respondent contends the employee acted as an individual, and it had no knowledge that his activity was concerted.

I deem it unnecessary to determine whether Pierce was engaged in union and/or concerted activity on December 5, 1989, because the facts surrounding the incident cause me to conclude that his actions during the incident under discussion were not protected by the Act.

Recently, in *Lear-Siegler Management Service Corp*., 306 NLRB 393 (1992), the Board considered a situation in which an alleged discriminatee utilized threats to induce a witness to testify in a certain way in a Board proceeding. Finding that the alleged discriminatee was not entitled to backpay or reinstatement after the threat was made, the Board stated:

> The integrity of the Board's judicial process depends on witnesses telling the truth, as they see it, without fear of reprisal or promise of reward. That integrity was compromised when Sumlin was threatened with reprisal if he changed his anticipated testimony. It makes no difference that Wood may have believed that he was seeking to ensure true testimony as he saw it. The essential point is that persons should not threaten potential witnesses, even if it be in the name of ensuring supposedly truthful testimony. Sumlin, and any other witness in a Board proceeding, should be free to testify to the truth, without fear of reprisal, as they see the truth. It is then the role of the judge and the Board to determine whether the testimony is true or false.

While the threat in *Lear-Siegler* was to inform the potential witness' parole officer that he had engaged in activity which violated the terms of his parole, and the threat made by Pierce was to sue Napoli for defamation of character, I conclude the Board's remarks in *Lear-Siegler* dictate that I find Pierce removed himself from the protection afforded by Section 7 of the Act when he threatened to institute a civil action against Napoli unless he gave him an affidavit supporting his position in the ongoing dispute he was experiencing with Respondent. In the circumstances described, I find that General Counsel has failed to prove that Respondent terminated Jeffrey Pierce in violation of Section 8(a)(1) and (3) of the Act as alleged.

[16] I find no merit to General Counsel's claim that the arbitration proceedings were unfair because Teas did not disclose the fact that he was the special deputy who visited Napoli's pizza store, or his claim that use of the Napoli affidavit during those proceedings was improper. Teas and Pierce decided that Teas' identity should not be disclosed initially, but Teas admitted he was the special deputy who accompanied Pierce to the store before the panel's final decision was reached. With respect to the affidavit contention, the record reveals the Union offered statements taken by Pierce from witnesses who observed the November 21 and 22 incidents. As both parties used statements, there was no unfairness.

The Alleged 8(a)(5) Violation

As indicated, supra, the information the Union requested by its letters dated December 28, 1989, and January 17, 1990, was presumptively relevant because it pertained to the ''wages and related information of unit employees.'' Moreover, General Counsel established affirmatively during the instant proceeding that such information had potential relevance to Pierce's discharge grievance. While Respondent claimed during the instant proceeding that production of Pierce's pickup and delivery records and its computer operation reports would impose an undue burden on it, the only reasons offered for its failure to produce the requested information prior to trial was that it considered the requested information to be irrelevant to resolution of Pierce's grievance.

In sum, although Respondent offered testimonial evidence through Larry Henry, which was to the effect that some of the records requested by the Union were not maintained by it for 9 months, and Henry claimed that production of delivery records and computer operation reports would subject Respondent to an unduly burdensome task, Respondent has failed to rebut the presumption that the requested information was relevant information needed by the Union to enable it to effectively and fully represent Jeffrey Pierce. Accordingly, I find that by refusing to furnish the Union with the requested delivery records, pickups logs, misload cards, and computer operation reports which it possessed for the period commencing March 20, 1990, and ending on December 13, 1989, Respondent violated Section 8(a)(5) and (1) of the Act as alleged.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By refusing to furnish the Union with requested information which was relevant to Jeffrey Pierce's discharge grievance, Respondent violated Section 8(a)(5) and (1) of the Act.

4. Deferral to the award of the arbitration panel is not warranted in the circumstances of this case.

5. Respondent did not violate Section 8(a)(1) and (3) of the Act by discharging Jeffrey Pierce on December 13, 1989.

REMEDY

Having found that the Respondent has engaged in unfair labor practices, in violation of Section 8(a)(5) and (1) of the Act, I shall recommend that it be ordered to cease and desist therefrom and that it take certain affirmative action to effectuate the policies of the Act.

Having found that Respondent did not terminate Jeffrey Pierce in violation of the Act, I find that no useful purpose would be be served by recommending that Respondent produce at this time the information requested by the Union's letters of December 28, 1989, and January 17, 1990. Instead, I conclude a general cease-and-desist order will suffice in the circumstances presented in this case.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[17]

ORDER

The Respondent, United Parcel Service, Inc., Obetz, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to furnish Teamsters Local Union 413, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO, on request, with information which is relevant and necessary to permit it to carry out its obligations as the collective-bargaining representative of bargaining unit employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its Renoldsburg facility located in Obetz, Ohio, copies of the attached notice marked ''Appendix.''[18] Copies of the notice, on forms provided by the Regional Director for Region 9, after being duly signed by the Respondent, shall be posted by it immediately upon receipt thereof and be maintained for a period of 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps it has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to furnish Teamsters Local Union 413, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO, on request, with information which is relevant and necessary to permit it to carry out its obligations as the collective-bargaining representative of bargaining unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights under Section 7 of the Act.

UNITED PARCEL SERVICE, INC.

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[17] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[18] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''